

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 16-22822-Misc-COOKE/TORRES

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

AMERICAN SALES & MANAGEMENT
ORGANIZATION, LLC,

Respondent.

**RESPONDENT’S MEMORANDUM OF LAW IN OPPOSITION TO
PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA**

The Respondent, American Sales & Management Organization, LLC, d/b/a Eulen America (“Eulen”), hereby submits its Memorandum of Law opposing the NLRB’s petition seeking to enforce its administrative subpoena. As comprehensively discussed below, the NLRB’s petition should be dismissed, and its subpoena duces tecum revoked, because the NLRB lacks any jurisdiction over Eulen. More specifically, as a derivative air carrier, Eulen is subject to the Railway Labor Act¹ and, as such, is not properly considered an employer within the meaning of Section 2(2) of the National Labor Relations Act.²

I. This Court is authorized to determine whether the NLRB has the jurisdiction to issue and enforce an administrative subpoena

In its application, the NLRB takes the position that this Court’s review of an administrative subpoena is “extremely limited.” (Doc. 1, p. 11). Contrary to the NLRB’s position, however, the

¹ 45 U.S.C. § 151 *et seq.*

² 29 U.S.C. § 152(2).

Eleventh Circuit has recently clarified that, as it pertains to jurisdictional issues, the Court's review is broad. To this end, in *Amerijet Intern., Inc. v. NLRB*, 520 Fed Appx. 795 (11th Cir. 2013), *cert. denied*, 134 S.Ct. 1052 (2014), the Court instructed, "if, for example, the NLRB seeks to enforce a subpoena under section 11(2) of the NLRA, 29 U.S.C. § 161(2), it must do so in the district court, and Amerijet would be free to challenge the Board's jurisdiction at that point." *Id.* at 798. Accordingly, where an issue of jurisdiction is raised, the Court is not limited to simply determining if the evidence sought in the subpoena is related to a matter under investigation and described with sufficient particularity.

II. The NLRB lacks jurisdiction to enforce a subpoena in this case as Eulen is subject to the Railway Labor Act

In this case, the NLRB lacks jurisdiction over Eulen because Eulen is not properly considered an employer subject to the National Labor Relations Act. 29 U.S.C. § 151 *et seq.* The NLRA specifically excludes from its coverage "any person subject to the Railway Labor Act[.]" 29 U.S.C. § 152(2); *see also* 29 U.S.C. § 152(3) (defining covered employees to specifically exclude "any individual employed by an employer subject to the Railway Labor Act"). Accordingly, it is beyond dispute that, if Eulen is subject to the coverage of the Railway Labor Act, the NLRB lacks jurisdiction over it.

Turning to the Railway Labor Act's coverage, that statute is applicable to air and rail carriers, and broadly defines "carriers" to include:

Any company which is directly or indirectly owned or controlled by or under common control with any carrier ... and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit ... and handling of property transported[.]

45 U.S.C. § 151, First.

As evident in this definition, the Railway Labor Act not only governs labor relations between common carriers (e.g., airlines and railroads) and their employees, but also the labor relations of carrier-support companies, commonly referred to as “derivative carriers.” The inclusion of derivative carriers within the same labor relations framework as common carriers serves the important federal policy of avoiding interruptions in the service of carriers critical to national and international commerce.

To this end, the Railway Labor Act was amended in 1934 to expand its coverage to include these derivative carriers “in order (1) to avoid the possibility that certain employees could interrupt commerce with a strike, and (2) to prevent a carrier covered by the RLA from evading the purposes of the Act by spinning off components of its operation into subsidiaries or related companies.” *Verrett v. SABRE Grp., Inc.*, 70 F. Supp. 2d 1277, 1281 (N.D. Okla. 1999) (citing *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 556, 57 S.Ct. 592, 81 L.Ed. 789 (1937)).³ As the *Verrett* court highlighted, “when the activities of carrier affiliates are necessary to the operations of an air carrier, and a labor dispute at the affiliate could cripple airline operations, those affiliates must be subject to the RLA because such disruption is the very type of interruption to air commerce the RLA was designed to prevent.” 70 F. Supp.2d at 1281.

It is well established that, for these derivative carriers who are not directly engaged in the transportation of freight or passengers, a two-part test applies to determine whether the Railway Labor Act applies on the basis of indirect ownership or control: (1) whether the work performed by the entity’s employees has traditionally been performed by the employees of an air carrier (the

³ See also *Texas & N.O.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 565, 50 S. Ct. 427, 432, 74 L. Ed. 1034 (1930) (“The major purpose of Congress in passing the Railway Labor Act was ‘to provide a machinery to prevent strikes.’”).

“function” test); and, (2) whether there is common ownership or control between the entity and the air carrier (the “ownership or control” test). *Air Serv. Corp.*, 33 NMB 113 (2013); *ServiceMaster Aviation Svcs.*, 325 NLRB 786, 787 (1998).

As the court in *Cunningham v. Electronic Data Systems Corp.*, 2010 WL 1223084, *4, 15 Wage & Hour Cas.2d (BNA) ¶ 1981 (S.D. N.Y. Mar. 30, 2010), noted in reviewing the application of these elements,

The outer limits of the RLA’s reach are not marked clearly. The statute plainly applies to “common carriers by air,” such as American and other commercial airliners. 45 U.S.C. § 181. But to effectuate the purpose of avoiding interruptions to air and rail transport, the RLA extends beyond airlines and railroads themselves and also applies to certain employers that provide services necessary to the operations of a common carrier. *See Verrett*, F.Supp.2d at 1281. The RLA applies, for example, to companies that provide airlines with cargo-handling and shuttle-bus services, even though such companies do not actually operate airplanes. *In re Int’l Cargo Marketing Consultants*, 31 NMB 396 (June 18, 2004) (cargo-handling); *In re Air Serv*, 35 NMB 201 (July 9, 2008) (shuttle-bus).

In assessing whether an entity satisfies the function component of the derivative carrier test, the National Mediation Board has determined that functions which qualify as services traditionally performed by air carriers include such things as baggage handling, checkpoint and security services, skycap services, cabin cleaning, and wheelchair assistance. *Cunningham, supra* at *4; *Primeflight Aviation Services, Inc.*, 353 NLRB 467 (2008); *Bags, Inc.*, 40 NMB 165, 168 (2013); *VGR Int’l Business, Inc.*, 27 NMB 232 (2000); *Int’l Total Servs.*, 20 NMB 537 (1993); *Sky Valet*, 18 NMB 482 (1991); *Airport Aviation Svcs.*, 19 NMB 190 (1992).

In assessing whether an entity satisfies the ownership or control component of the derivative carrier test, relevant factors include: (1) the extent of the carrier’s control over the manner in which the company conducts its business; (2) access to the company’s operations and records; (3) the carrier’s role in personnel decisions; (4) the degree of supervision exercised by the carrier; (5) the carrier’s control over training; and (6) whether the employees in question are held

out to the public as carrier employees. *Bags, Inc.*, 40 NMB at 168-9; *Automobile Distr. Of Buffalo, Inc. and Complete Auto Network*, 37 NMB 372, 378 (2010). The control component focuses on the role that the carriers play in the company's daily operations and on the manner in which the employees perform their jobs. *See e.g., Quality Aircraft Servs.*, 24 NMB 286, 291 (1997).

In applying these factors, sufficient common control to establish derivative carrier status has been found where, for example, the air carrier dictated minimum staffing and its flight schedules affected the work schedules of the derivative entity's employees, provided equipment and office space to the derivative entity, dictated the service procedures to be followed and imposed financial penalties for failing to do so, and requested that the derivative entity investigate and discipline employees on occasion. *Air Serv Corp.*, 33 NMB 272 (2006); *see also Air Serv Corp.*, 38 NMB 113 (2011).

Turning to the present case, there can be no dispute that Eulen satisfies the functional component of the derivative carrier test. Indeed, the Respondent's entire business involves providing services to airlines which were traditionally performed by the airlines themselves. These services include baggage handling, aircraft cabin cleaning, skycap services, wheelchair and passenger assistance, security services, and the like. (Tunon Affd. ¶ 3).⁴ Eulen provides these services for airlines such as American Airlines, Delta, JetBlue, Westjet, Turkish Airlines, AeroMexico, and numerous others. (Tunon Affd. ¶ 4). Eulen provides these services at Miami International Airport, which is the site of the underlying unfair labor practice allegations, as well as at numerous airports throughout the country. (Tunon Affd. ¶ 3).

⁴ The affidavit of Cindy Tunon, Eulen's corporate representative in this matter, is attached hereto as Exhibit 1.

Similarly, the facts at issue in this matter, and those previously provided to the NLRB, likewise establish that the control element has also been met.⁵ As detailed in the attached affidavit of Eulen's corporate representative, Eulen's air carrier clients exercise significant and substantial control over its operations. Indeed, the air carriers effectively dictate what Eulen employees do, when they do it, where they do it, and how they do it.

To this end, Eulen's staffing levels are effectively set by requirements imposed by the airlines, with specific staffing often set during the bid process or spelled out by contract. (Tunon Affd. ¶ 11; Layson Decl. ¶ 26). Eulen's employee schedules are also dictated by the Airlines' flight schedules, over which Eulen has no control whatsoever. (Tunon Affd. ¶ 12; Layson Decl. ¶¶ 24, 27). For many employees, such as cabin cleaners, the airlines dictate the number of employees that Eulen must use to provide the service. (Tunon Affd. ¶ 13; Layson Decl. ¶¶ 28-30). For many of Eulen's airline clients, Eulen is not permitted to vary its staffing levels without first notifying the carriers. (Tunon Affd. ¶ 15; Layson Decl. ¶ 31). The carriers, on the other hand, routinely request that Eulen make staffing changes, which Eulen must accommodate. (Tunon Affd. ¶ 15; Layson Decl. ¶¶ 31-34).

Significantly, not only do the airlines regularly direct Eulen to have its employees work past the end of their shifts, or to work during different shifts than scheduled, but the airlines also

⁵ Although the NLRB's petition notes that Eulen did not respond to its "Questionnaire on Commerce Information," Eulen did provide the NLRB with its position statement regarding the alleged unfair labor practice, as well as with an affidavit demonstrating the NLRB's lack of jurisdiction in this case. There is no dispute in this case that Eulen did engage in sufficient interstate commerce to satisfy that provision of the NLRA. However, as discussed above, the NLRB nonetheless lacks jurisdiction due to the fact that Eulen is covered as a derivative air carrier under the Railway Labor Act. In addition to the current affidavit of Eulen's corporate representative attached hereto as Exhibit 1, attached hereto as Exhibit 2 is the declaration previously submitted by Eulen to the NLRB concerning the jurisdictional issue. Additionally, attached as Exhibits 3 and 4, respectively, are the position statements submitted in this matter by Eulen, dated February 5 and 22, 2016.

require Eulen to gain their approval before employees are permitted to work overtime. (Tunon Affd. ¶ 14; Layson Decl. ¶¶ 35-37). The failure by Eulen to obtain approval for overtime worked by its employees will result in Eulen not being compensated by the airlines at the overtime rate. (Tunon Affd. ¶ 14).

On occasion, Eulen's airline clients have dictated that specific employees be removed from providing services to the airline, which requires that Eulen transfer or discharge the employee in question. (Tunon Affd. ¶ 18; Layson Decl. ¶¶ 62, 66-67, 71-73). Additionally, on occasion, some airlines have expressly requested that specific personnel be hired by Eulen to provide services to the particular airline. (Tunon Affd. ¶ 19; Layson Decl. ¶¶ 63, 74). Moreover, even though Eulen hires its employees, some airlines conduct their own background checks of the employees who will service those specific airlines. (Tunon Affd. ¶ 20; Layson Decl. ¶¶ 64-65).

Upon being hired, Eulen employees must undergo training mandated by the airlines. (Tunon Affd. ¶ 26; Layson Decl. ¶¶ 59-61, 82). Indeed, some carriers provide their own computer-based training and mandate that Eulen employees complete such training before being permitted to provide services, or to continue to provide services, to those airlines. (Tunon Affd. ¶ 26; Layson Decl. ¶¶ 82-87). Many of the training records for Eulen employees are maintained by the carriers themselves and the training records maintained by Eulen directly are made available for review by the carriers. (Tunon Affd. ¶ 26).

Eulen's management meets daily with representatives of the airlines for purposes of discussing any issues that need to be addressed and to determine how best to deploy Eulen employees. (Tunon Affd. ¶¶ 21-22; Layson Decl. ¶¶ 39-44). Importantly, airline representatives at each airport regularly direct Eulen employees in the performance of their duties. (Tunon Affd. ¶ 24; Layson Decl. ¶¶ 76-81). To this end, the airline representatives and Eulen employees work in

close proximity and it is not required that airline representatives go through Eulen's management prior to providing direction to Eulen employees. (Tunon Affd. ¶ 24).

Many of Eulen's airline clients also regularly conduct audits or other performance reviews to determine whether Eulen employees are satisfactorily providing services to the airlines. (Tunon Affd. ¶ 22; Layson Decl. ¶¶ 45-49). Critically, Eulen is subject to being fined by its carriers for failing to comply with many of the mandates noted above. For instance, Eulen is subject to fines of \$100 per day per employee by American Airlines for any employee who fails to timely complete airline-mandated training. (Tunon Affd. ¶ 29(c), (f)). Similar fines are levied against Eulen by the airlines whenever Eulen employees: are not wearing an appropriate uniform, mishandle baggage, fail to provide satisfactory passenger assistance or wheelchair service, cause a delay in flight departures, breach applicable regulations, or fail to achieve an acceptable audit performance rating. (Tunon Affd. ¶ 26, 29-30).

As these facts make clear, the air carriers to whom Eulen provides its services, exercise significant control over Eulen, its operations, and its personnel. The carriers' have nearly unfettered access to Eulen's operations and records. They have substantial impact on Eulen's personnel decisions and, indeed, regularly dictate those decisions. The carriers dictate the training that Eulen employees must receive and penalize Eulen whenever any employee fails to timely comply. Considering the factors applied by the National Mediation Board and the courts in determining jurisdiction under the Railway Labor Act, Eulen constitutes a derivative air carrier. As such, the NLRB lacks jurisdiction over Eulen and enforcement of its administrative subpoena should be denied.

III. The NLRB's expansive joint employer test further shows that Eulen is a derivative air carrier subject to the Railway Labor Act

Further supporting the conclusion that Eulen is a derivative air carrier subject to the jurisdiction of the Railway Labor Act is the NLRB's recent decision in *Browning-Ferris Ind. of California* ("*BFI*"), 362 NLRB No. 186, 2015 WL 5047768 (Aug. 27, 2015). In *BFI*, the NLRB revised its joint employer analysis and determined that BFI was a joint employer with Leadpoint Business Services because BFI had the authority to control conditions of employment, even where the right was not exercised. In reaching this conclusion, the NLRB noted:

Even where it appears that the user [entity], in practice, has ceded administration of a term to the supplier [entity], the user can still compel the supplier to conform to its expectations. In such a case, a supplier's apparently independent control over hiring, discipline, and work direction is actually exercised subject to the user's control.

Id. at * 13-14.

Applying its revised joint employment standard, the NLRB determined that BFI was a joint employer over Leadpoint's employees even though it was Leadpoint that hired and fired the employees, determined the pay rates, and directed the employees. *Id.* *23. In so holding, the NLRB noted that BFI specified the number of Leadpoint workers it required, dictated the timing of shifts, determined when overtime was necessary, required employees to undergo drug tests, etc. *Id.* BFI also retained the right to discontinue the use of any Leadpoint personnel, which the NLRB felt showed the requisite control even though BFI had never exercised that right. *Id.* at *22.

Looking to the facts of the present case, these same factors that the Board relies on to show joint employment likewise show that Eulen is a derivative air carrier subject to the provisions of the RLA and not the NLRA. To hold otherwise would undermine the purposes of the RLA by allowing broad NLRA-sanctioned work stoppages to disrupt air carrier operations by targeting airline contractors notwithstanding the RLA's more restrictive provisions concerning such work stoppages.

IV. The documents requested by the NLRB is not reasonably related to the investigation and is overly broad and not described with sufficient particularity

Additionally, the NLRB's subpoena duces tecum should not be enforced as the documents sought are not reasonably related to the investigation, are overly broad and are not sufficiently specific to the issues involved in the underlying investigation. Under the NLRB's own rules, a subpoena should not be enforced where the "evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid." 29 C.F.R. § 102.31(b); *see also Brink's, Inc.*, 281 NLRB 468 (1986).

Under this standard, a subpoena should not be enforced where it requires "disclosing a trade secret or other confidential ... commercial information." Fed. R. Civ. P. 45(d)(3)(B)(i). Likewise, where the request is, *inter alia*, unduly burdensome, it should not be enforced. *NLRB v. Nornat, Inc.*, 2016 WL 233098, at *2 (N.D. Ill. Jan. 20, 2016) ("A subpoena should not be enforced if the demand for information was made for an illegitimate purpose, or is excessively burdensome[.]" (citing *EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642-45 (7th Cir. 1995); *Drukker Communications, Inc. v. NLRB*, 700 F.2d 727, 732 (D.C. Cir. 1983); *J.H. Rutter Rex Mfg. Co., Inc. v. NLRB*, 473 F.2d 223, 231 (5th Cir. 1973)).

The investigatory subpoena in this case seeks information which is not related to any matter under investigation and which also seeks the disclosure of confidential proprietary commercial information that Eulen contends constitutes a protectable trade secret. To this end, the service contracts that Eulen has with its carrier customers are extensive documents which detail not only the nature of Eulen's businesses, but also the pricing information and sensitive business information which is not otherwise available to the public or its customers and which provide it a

competitive advantage by virtue of its unavailability. Disclosure of such information would reveal confidential commercial information and trade secret information. *See Marlite, Inc. v. Eckenrod*, 2011 WL 39130, *5 (S.D. Fla. Jan. 5, 2011) (“[P]ricing information such as expenses, costs, profit margins, and run rates have been held to constitute trade secrets.”); *Thomas v. Alloy Fasteners, Inc.*, 664 So.2d 59, 60 (Fla. 5th DCA 1995) (finding that trade secrets included pricing and that such information “would obviously be important for a competitor in deciding how much it could undercut Alloy’s prices.”); *Laser Spine Inst. v. Mekanast*, 69 So. 3d 1045, 1046 (Fla. 2d DCA 2011) (documents pertaining to billing and cost data constitute trade secrets); *Summitbridge Nat’l Invs. v. 1221 Palm Harbor, LLC*, 67 So. 3d 448, 450 (Fla. 2d DCA 2011) (data concerning rate structures and how customers are charged is a trade secret). Accordingly, the subpoena should be revoked.

Significantly, the disclosure of Eulen’s proprietary carrier contracts is not relevant to any matter still under investigation. To this end, the NLRB takes the position that the requested carrier contracts are relevant to Eulen’s position that the NLRB lacks jurisdiction as a derivative air carrier under the Railway Labor Act. While Eulen’s defense in this regard might ordinarily make the specifics of its relationships with the air carriers relevant, in this case it is clear that that issue is not currently under investigation as the NLRB’s investigatory arm has already conducted prior investigations on this issue and concluded that it had jurisdiction over Eulen. To that end, Region 12, Region 29, and Region 5 of the NLRB⁶ have issued prior complaints against Eulen America after investigating and concluding that the Board possessed jurisdiction. Given that context, it is clear that the subpoena in this case is not to seek information for a matter under investigation, but

⁶ *See American Sales and Management Organization, LLC d/b/a Eulen America*, Case No. 12-CA-113350 and *American Sales and Management Organization, LLC d/b/a Eulen America*, Case No. 5-CA-161072.

to seek inappropriate pre-complaint discovery on matters pending in other cases. As such, the subpoena should not be enforced.

Lastly, the NLRB's request for the names, mailing addresses, e-mail addresses, home phone numbers, and cell phone numbers for all wheelchair attendants working at Miami International Airport from January 1, 2014 through April 14, 2016 is overly broad and unduly burdensome. Eulen employs hundreds of employees at its operations at Miami International Airport. The NLRB's broad request for information on all of these employees, which it now justifies on the basis that it "needs to contact employees who are believed to have relevant information regarding the discharge of employee Freddy Gonzalez," is not described with sufficient particularity and is overly broad. There can be no legitimate contention that hundreds of Eulen's wheelchair assistants, none of whom were involved in the decision to discharge Freddy Gonzalez, have relevant information concerning this matter.⁷ To the contrary, rather than seek specific information pertaining to the allegations at issue in this case, the NLRB is seeking to conduct a fishing expedition by requesting information concerning hundreds of employees who are uninvolved in this matter. This Court should reject the NLRB's attempt to do so.

WHEREFORE, the Respondent, American Sales & Management Organization, LLC, respectfully requests that this Court deny the National Labor Relations Board's petition seeking to enforce its administrative subpoena and dismiss the instant petition.

Respectfully submitted,

s/ Brian Koji

⁷ Indeed, as set forth in Exhibit 3, Gonzalez was discharged for his repeated tardiness and absenteeism, not for any reasons involving his co-workers. Moreover, at the NLRB's request Eulen has previously produced a number of documents and personnel files for over 30 other employees (selected by the NLRB) working at Miami International Airport to enable the NLRB to review whether Gonzalez was treated consistently with other employees.

Brian Koji
Florida Bar No. 0116297

Allen Norton & Blue, P.A.

Hyde Park Plaza, Suite 225
324 S. Hyde Park Avenue
Tampa, Florida 33606-4127
Tampa, Florida 33606-4127
(813) 251-1210

Primary: bkoji@anblaw.com
Secondary: amccclanahan@anblaw.com
tcarnevalini@anblaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to Marinelly Maldonado, Esquire, 51 SW 1st Avenue, Room 1320, Miami, FL 33130 [marinelly.maldonado@nlrb.gov].

s/ Brian Koji

Attorney